United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

No. 74-2173

RICHARD G. BOLIO, JR., Plaintiff-Appellant

V

FORD MOTOR COMPANY Defendant-Appellee

Appeal from the United States District Court for the District of Vermont -- Civil Action No. 73-93

BRIEF OF

PLAINTIFF-APPELLANT

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ISSUE PRESENTED: WHETHER THE LOWER COURT ERRED IN REFUSING TO ALLOW THE PLAINTIFF TO INTRODUCE TESTIMONY CONCERNING CONSEQUENTIAL DAMAGES WHICH REFUSAL LED TO A DISMISSAL OF THE COMPLAINT FOR FAILURE TO MEET THE JURISIDCTIONAL AMOUNT IN CONTROVERSY.

STATEMENT OF THE CASE: This is an appeal from an order of District Judge Albert W. Coffrin in the United States District Court for the District of Vermont, entered on July 17, 1974, dismissing the complaint of Richard G. Bolio, Jr., Appellant herein, for the reason that the matter in controversy failed to exceed the sum or value of $10,000. The Appellant Bolio had brought suit against the Ford Motor Company, a Delaware corporation and Appellee herein, on five counts of breach of contract and warranties and various statutory violations. Four of the counts were dismissed by the District Judge and the case proceeded to trial on the count alleging breach of contract and warranties.

Bolio, a resident of Vermont, was in the business of hauling goods by truck for hire. (TR. 24). In the course of his business, Bolio purchased a heavy duty tractor trailer truck, a 1972 Ford Series WT900, from Nordic Ford Sales, Inc. of Burlington, Vermont, a duly authorized and licensed franchise

dealer of Appellee Ford Motor Company (hereinafter "Ford") (TR. 25). The cost of said truck was Twenty Four Thousand Eight Hundred ($24,800.00) Dollars of which Bolio paid a down payment in cash of Forty Three Hundred and Fifty ($4,350.00) Dollars (TR. 156).

Immediately after taking delivery of said truck, multiple defects in the workmanship, materials, mechanical operation, and construction of said truck appeared. (TR. 48, 49,50). These defects were reported immediately to Ford, Nordic Ford and their agents and representatives (TR. 49). After seven and one-half months, the defects remained uncorrected, Ford, Nordic Ford and their agents and representatives being either unwilling or unable to correct them. (TR. 50)

During that seven and one-half months, Bolio incurred incidental and consequential damages as a direct result of the defects, largely lost time and lost profits, which damages would easily have exceeded the jurisdictional amount in controversy requirement of $10,000. (TR. 62, 53, 64)

The contract of sale between Bolio and Ford contained the standard disclaimer of warranties, express or implied, substituting therefore the limited guarantee that Ford and Nordic Ford would repair or replace any defective part. (Ex. 26). The warranty further excluded Ford's liability for any consequential damages that Bolic might suffer. (Ex. 26) It was on the basis of this limitation that the District Judge refused to allow evidence of consequential damages (Tr. 195),

and thereafter ordered dismissal of the complaint (TR. 201), from which order Bolio brings this appeal.

ARGUMENT

The limited issue on this appeal is, as stated above, the admissability, in this factual situation, of evidence concerning the consequential damages suffered by the Appellant Bolio as a result of the defective nature of the truck he purchased from the Appellee Ford Motor Company. The larger issue, of course, goes far beyond this narrow question. It is a matter of responsibility, corporate responsibility.

Ford is in the business of selling automobiles and trucks. Undoubtedly the great majority of those products will meet the needs of those who purchase them, or at least may be put in such condition as to do so. Wher, however, Ford sells a product which is so defective as to be irreparable and thus worthless, it must take responsibility. It must account for its actions and make restitution therefore.

The language contained in Ford's disclaimer of warranties and limitation of remedies states that Ford will only be responsible for repair or replacement of any defective parts. In most cases, although not an ideal remedy, such a guarantee is sufficient. Here, unfortunately, this guarantee was worthless, for the truck could not be repaired so as to put it into a usable condition.

Much was said in the lower court regarding the commercial use of this truck. Not being classifiable as consumer goods, this truck is somehow seen as requiring less in the nature of warranty protection against defects. Its purchaser, or businessman, is seen as more able to fend for himself in purchasing equipment. It requires, however, no business sophistication whatsoever to realize that this was not an example of two corporate giants sitting down to negotiate a contract of sale. The disclaimer and limitation language in the contract of sale is pure boilerplate, presented to the purchaser on a "take it or leave it" basis. Bolio knew he could expect nothing better from General Motors, Chrysler or any other truck manufacturer.

The rising tide of public outrage against corporate irresponsibility increases daily. In the past, the big business syndrome obscured any rights the consumer might assert. The corporate fortress was virtually unassailable, and few people saw any purpose in assaulting it. Consumer protection, however, is a watchword today, and those who incessantly tell us of the virtues of the products they vend are becoming increasingly aware that they must live up to those promises.

Richard Bolio was exposed daily to these promises, these commercial messages, as we all are. They told him that Ford's trucks would not only do the job for which he needed them, but that he could not buy a finer truck. There was much discussion in the lower court as to whether such advertisements

constituted an express warranty. When Ford speaks of the excellent quality of its trucks, can the prospective purchaser somehow read between the lines that Ford is actually saying that the truck may or may not be capable of performing? Such a conclusion would be logical if Ford were to include its disclaimer of warranties and limitation of remedies at the end of each commercial or advertisement, but certainly not otherwise.

Richard Bolio purchased one of Ford's trucks to use in his business. The purchase price of that truck was nearly $25,000. Certainly he did not expect a totally trouble-free vehicle, but neither did he expect that the truck would eventually cost him much more than the purchase price he paid. He expected that he could use this truck in his business and make a living from it, not that he would lose time and money in a futile attempt to put it in operable condition, or that he would be forced to take his life into his hands whenever he drove it. For seven and one-half months he struggled with this vehicle before finally surrendering and returning it to the dealer. He is now told that he can't even get back that part of the purchase price that he paid. The time and money he spent because he believed Ford when they told him that this truck would do the job for which he bought it, that if it did not run properly, it could easily be repaired, that Ford could and would make repairs promptly, are non compensable items under the contractual language limiting

Ford's liability.

All of these representations proved to be untrue in this case. The truck was not capable of doing the job for which he bought it or, indeed, of any job whatsoever. It was so defective as to be irreparable. Is Ford's insulation from liability so complete that that it can disclaim any responsibility for the damage suffered by the purchaser as a direct result of the sale of such a vehicle? Such a result is nothing less than outrageous and should not be sanctioned by this court.

The Uniform Commercial Code, V.S.A. Title 9A, §§ 1-101, et. seq., was drafted in an attempt to provide some protection for both parties in the commercial setting. Section 1-102(1) of the Code states that

> This Act shall be liberally construed and applied to promote its underlying purposes and policies.

V.S.A) Title 9A, § 1-102(1). Throughout the Code one finds examples of the requirement of reasonableness as one of the Code. It is within such a framework that the language of the contract at issue must be judged.

Section 2-719 of the Code purports to leave the parties free to shape their remedies and "reasonable agreements limiting or modifying remedies are to be given effect." Uniform Commercial Code § 2-719, Comment 1. Section 2-719(1) states that the agreement may provide that the measure of damages recoverable may be limited, as in the instant contract,

to repair or replacement of defective parts. Section 2-719(3) states that consequential damages may be limited unless the limitation is unconscionable.

Once again the unequal bargaining position of the parties to this contract of sale must be stressed. Although Section 2-719 purports to leave the parties free to shape their own agreement, the only alternative given to Bolio to the provisions set forth by Ford in the contract was to refrain from purchasing any truck at all. He certainly had no hand in "shaping" the agreement.

The Code seems to allow for this type of situation, however. In the official comment to Section 2-719, the drafters stated that:

> it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.

Uniform Commercial Code § 2-719, Comment 1.

Ford has limited the remedies of the purchaser Bolio solely to repair or replacement of defective parts. This remedy has proved totally useless, since the truck was so defective as to be irreparable. Thus Bolio has been provided

in effect with no remedy at all. In this eventuality, Section 2-719(2) of the Code is invoked to protect the remediless party.

> Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

V.S.A. Title 9A, § 2-719(2). It could not be clearer that the instant situation is exactly that envisioned by the drafters of § 2-719(2). The limited remedy of repair or replacement was intended to provide the purchaser with an operable vehicle. This was its essential purpose and it has utterly failed in that regard.

The exclusion of consequential damages is an inseparable part of the limitation of remedies to that of repair or replacement. A statement that the sole remedy of the purchaser shall be repair or replacement obviously means that there shall be no other. The exclusion of consequential damages is thus nothing more than an elaboration of the limited remedy provision. Deletion of one clause under § 2-719(2) thus mandates the deletion of the other, and the purchaser is thus given access to the general remedy provisions of the Code, including consequential damages as outlined in § 2-714(3).

The official uniform comment to section 2-719(2) of the Uniform Code confirms and elaborates upon this conclusion.

> Under subsection (2), where an apparently fair and reasonable clause because of circumstances fails of its essential purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.

Uniform Commercial Code, § 2-719, Comment 1.

Such a construction has been placed on Section 2-719(2) by the courts. In Adams v. J.I. Case Co., 125 Ill. App. 2d 388, 261 N.E.2d 1 (1970), the plaintiff purchased a tractor from the defendant which proved to be defective. Although the tractor was eventually repaired by the defendants under its limited warranty to repair or replace defective parts, the court found that the length of time that the defendant required to perform the repairs was unreasonable, and reversed the lower court's dismissal of the plaintiff's action for consequential damages.

The disclaimer of warranties and limitation of liability clauses in Adams were identical to those in the instant case. The court, however, refused to allow the defendant to assert its exclusion of consequential damages where it had failed to reasonably comply with its limited warranty of repair or replacement. The benefits of the limitation were not separable from the obligation of the warranty. That court reasoned:

> It should be obvious that they cannot at once repudiate their obligation under the warranty and assert its provisions beneficial to them.

261 N.E.2d at 8.

In Jones & McKnight Corp. v. Birdsboro Corp., 320 F. Supp. 39 (N.D. Ill. 1970), the plaintiff had purchased equipment and machinery from the defendant. As in the Adams case, the items proved defective and the defendant failed to repair or replace them. Once again, the contractual language regarding warranties and remedies was almost identical to that in the case at bar.

The Jones & McKnight court, on appeal from an order granting summary judgment to the defendants on plaintiff's claim for consequential damages, cited and agreed with the Adams rationale. It stated:

> This court would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation has caused the very need for relief which the defendant is attempting to avoid.

320 F. Supp. at 43-44.

That court further mentioned the broad language used in the Official Comment as noted above and concluded that

> The rationale enunciated in this Comment manifestly indicates that the alleged failure of the defendant to meet its warranty obligations should deprive it of the benefits of the limited remedy clause.

Id. at 44.

Without citing the Adams or Jones & McKnight cases, the Fifth Circuit Court of Appeals similarly construed § 2-719(2), in Riley v. Ford Motor Co., 442 F.2d 670 (5th Cir. 1971). There the plaintiff had purchased a new Lincoln Mark III automobile, and the facts thereafter parallel those of the instant case almost exactly. The court on appeal held that Ford's inability to repair the defects in this new automobile "operated to deprive the purchaser of the substantial value of the bargain." 442 F.2d at 673. The court thus invoked § 2-719(2) and allowed the plaintiff to recover consequential damages.

In Beal v. General Motors Corp., 354 F. Supp. 423 (D. Del. 1973), the plaintiff had purchased an extra-heavy-tonnage diesel tractor from the defendant. The tractor was defective and the defendant was unable or unwilling to repair or replace the defective parts according to the limited warranty set out in the contract. As usual, the defendant expressly excluded liability for consequential damages. The court held that the plaintiff could recover consequential damages, citing the Jones & McKnight case, supra.

The Beal court expanded on the reasoning of the earlier decisions. It noted that the defendant had conceded that the plaintiff was entitled to direct damages measured by market values, and then inquired as to what gave such

remedy to the plaintiff. It was clearly not the contract, for the contract expressly stated that the right of replacement and repair was the purchaser's sole remedy. The right to direct damages arises out of § 2-714(2), but application of that section would be in derogation of the contract terms were it not for the provisions of § 2-719(2). The court then held that:

> There is no discernible reason for limiting that recourse to selected remedial provisions as defendant apparently attempts to do. The direct damages section 2-714(2) has no greater claim to application here than does the consequential damages section 2-714(3) assuming, of course, that this is otherwise "a proper case" for consequential damages.

354 F. Supp. at 427.

Appellee Ford will undoubtedly rely on the holding in County Asphalt, Inc. v. Lewis Welding & Engineering Corp., 323 F. Supp. 1300 (S.D.N.Y. 1970). The court there, on similar facts, refused to strike out the exclusion of consequential damages provision under the authority of § 2-719(2), as it felt that clauses other than the limited remedy clause should "be left to stand or fall independently of the stricken clause." 323 F. Supp. at 1309.

It should be noted that the court there had previously found that

> plaintiff's experience and expertise, and the parties' care in negotiating these large contracts preclude any argument of unfair surprise.

Id. at 1309. Such a statement certainly could not be made in the instant case. Furthermore, the Appellant respectfully submits that the court in County Asphalt gave an unreasonably narrow construction to § 2-719(2). Such a construction is certainly not mandated by the language employed therein and in the Official Comment, and, conversely, a liberal construction is mandated by § 1-102(1).

The District Court for the Eastern District of Michigan was forced to decide between the competing rationale found in the Adams and Jones & McKnight cases on the one hand and the County Asphalt case on the other. That court opted for the former and allowed the plaintiff to recover consequential damages. Koehring Company v. A.P.I., Inc., 369 F. Supp. 882 (E.D. Mich. 1974).

The Appellee Ford will also attempt to distinguish recovery of consequential damages on the theory that those cases involved a willful or negligent failure to repair. Initially, it should be noted that such a finding is possible in the instant case. The Appellant was prevented from concluding his presentation of evidence by the order of dismissal. Furthermore the court in Beal v. General Motors Corp., supra, addressed this issue directly. It held that

> The limited remedy fails of its purpose whenever the seller fails to repair the goods within a reasonable time; good faith attempts to repair might be relevant to the issue of what constitutes a reasonable time. However, since § 2-719(2) operates wherever a party is deprived of his contractual remedy there is no need for a plaintiff to prove that failure to repair was willful or negligent.

Beal v. General Motors Corp., 354 F. Supp. 423, 427, n.2 (1973).

Clearly this holding is the only reasonable result. Even the non-negligent inability of Ford to repair the truck still leaves the Appellant with an inoperable vehicle and no remedy. Thus, Ford's own act of producing and selling a vehicle so defective that it could not be repaired would operate to insulate it from liability. Such a conclusion is so patently offensive to reason and justice as not to deserve the consideration of this court.

The commentators have joined the courts in adopting a liberal interpretation of § 2-719(2). Two of the leading authorities on commercial law, James White and Robert Summers, have concluded that the allowance of consequential damages is "supported by the language of the Code and Comment 1." White & Summers, Uniform Commercial Code, § 12-11 at 382 (1972). See also 2 Anderson, Uniform Commercial Code, § 2-719:17 at 510 (2d ed. 1971).

As a further argument, Appellant contends that the exclusion by Ford of all consequential damages is invalid under V.S.A. Title 9A § 2-719(3). The Code, as drafted, stated in that section that consequential damages may be limited or excluded. The Vermont legislature, however, enacted § 2-719(3) in a different form. In the Vermont version, it is provided that:

> Consequential damages may be limited unless the limitation is unconscionable.

The intent of the legislature is thus clear. Consequential damages may not be totally excluded, and that provision of the contract attempting to do so is null and void.

Ford cannot contend that the prefunctory language of that provision of the contract specifically excluding loss of use or loss of time is still valid. The provision as a whole attempts to exclude consequential damages. Loss of time and loss of use are obviously consequential damages, and must fall with the rest of the provision. The court has no power to now attempt to reconstruct the provision so that it complies with § 2-719(3) of the Vermont Code.

CONCLUSION:

The Appellant respectfully prays that the court reverse the judgment of the lower court granting the defendants motion to dismiss for failure to meet the requisite amount in controversy and that it remand to the lower court with instructions allowing the Appellant to introduce evidence of his consequential damages.

Respectfully submitted,

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November 18, 1974

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RE: Richard G. Bolio, Jr. Plaintiff-Appellant VS Ford Motor Company, Defendant-Appellee - Docket No. 74-2173

Dear Mr. Fusaro:

Enclosed find twenty-five (25) copies of Appellant's Brief for filing in the above cause, two (2) copies of same having been sent this date by United States mail to John Dinse, Esq., Dinse, Allen and Erdman, 186 College Street Burlington, Vermont 05401, attorneys for Defendant-Appellee.

Very truly yours,

Gerard F. Trudeau

GFT:ab
Enclosures (25)

cc: John Dinse, Esq.